Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ATTORNEY GENERAL OF THE
STATE OF PENNSYLVANIA,

Petitioner,

v.

JOHN JOSEPH BLASI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

WILLIAM P. O'MALLEY*
Assistant District Attorney
EUGENE M. TALERICO
First Assistant District Attorney
ANDREW J. JARBOLA, III
District Attorney
Lackawanna County District
Attorney's Office
Lackawanna County Courthouse
200 North Washington Avenue
Scranton, Pennsylvania 18503
(570) 963-6717

* *Counsel of Record*

172140

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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QUESTION PRESENTED

WHETHER THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, IN ITS ANALYSIS OF THE ADMINISTRATIVE ORDER OF THE PENNSYLVANIA SUPREME COURT OMITTED, INCORRECTLY, TO APPLY THE DOCTRINE OF SEPARATION OF GOVERNMENTAL POWERS AND THEREBY TO RECOGNIZE, TO CONCLUDE AND TO ADJUDICATE THAT THE ADMINISTRATIVE ORDER, AS REGARDS THE QUESTION OF EXHAUSTION OF STATE REMEDIES IN FEDERAL HABEAS CORPUS CASES, NOT ONLY IS VIOLATIVE OF THE EXPRESS DIRECTION OF CONGRESS, BUT ALSO IS VIOLATIVE OF THE GUARANTEE CLAUSE IN ARTICLE FOUR OF THE UNITED STATES CONSTITUTION AND, THEREFORE, INVALID.

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OPINIONS BELOW

The opinion of the district court is reported; *see*: *Blasi v. Attorney General of the Commonwealth of Pennsylvania*, 120 F. Supp.2d 451 (M.D.Pa. 2000). (Appendix B).

The order and opinion of the Third Circuit Court of Appeals accompanies these papers. (Appendix A).

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on September 28, 2001. Petitioner's motion for rehearing and rehearing *en banc* was denied by order dated November 7, 2001. (Appendix E). The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article IV, Section 4 of the United States Constitution provides:

> **Section. 4.** The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence.

The federal habeas corpus statute, 28 U.S.C. § 2254, provides in parts here pertinent, e.g., subsections (b) and (c), as follows:

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that —

> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B)(i) there is an absence of available state process; or
>
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the laws of the State to raise, by any available procedure, the question presented.

STATEMENT OF THE CASE

Respondent, John Joseph Blasi, an inmate in the Pennsylvania prison system is serving a cumulative sentence of ten to twenty years imprisonment arising from convictions on four counts of involuntary deviate sexual intercourse, two counts of indecent assault and one count each of corruption of a minor, endangering the welfare of a child and indecent exposure. Mr. Blasi sought federal habeas corpus relief under 28 U.S.C. § 2254, alleging ineffective assistance of trial counsel. The district court denied the writ and denied a certificate of appealability.

By order dated February 13, 2001, the Court of Appeals granted a certificate of appealability and directed the parties to brief the following issues: (1) whether trial counsel was ineffective for failing to preserve the victim's testimony at the preliminary hearing; (2) whether trial counsel was ineffective for failing to object to the testimony of Joanne Kester Blasi on the ground of prosecutorial misconduct in presenting false testimony; (3) whether claim number 2 was fairly presented to [sic] on direct appeal; (4) whether the Pennsylvania Supreme Court's order of May 9, 2000 permits this court to deem claim 2 exhausted even though it was not presented in the petitioner's allocatur petition on direct appeal.

The Attorney General of the Commonwealth of Pennsylvania was invited to file an amicus brief. [Such amicus brief was separate from and additional to the *Brief For Appellee*, filed by the District Attorney of Lackawanna County Pennsylvania on behalf of the Attorney General as the named respondent/appellee in the federal habeas proceedings.]

The full text of the Pennsylvania Supreme Court's order of May 9, 2000 is set forth in Appendix C.

The Attorney General of the Commonwealth of Pennsylvania, in its brief filed in the Court of Appeals by the District Attorney of Lackawanna County Pennsylvania argued that the Pennsylvania Supreme Court's order of May 9, 2000 could have no bearing whatever on the question of exhaustion because such order was invalid for reasons which included the fact that the promulgation of such order violated the guarantee clause embodied in Article IV, Section 4 of the United States Constitution Administrative Order of the Pennsylvania Supreme Court

By memorandum opinion filed September 28, 2001, the United States Court of Appeals for the Third Circuit affirmed the district court's denial of the petition for writ of habeas corpus. (Appendix A). The Court of Appeals did not reach any of the four issues that the parties had been directed to brief; instead, in deciding Blasi's appeal the appellate panel found that because another panel of the court (to which the contention that the Pennsylvania Supreme Court's Order 218 dated May 9, 2000 was facially invalid had, presumably, never been addressed) had recently assumed in another case that Order 218 was valid but would not be retroactively applied, the appellate panel decided Blasi's appeal on the same basis.

REASONS FOR GRANTING THE WRIT

There are at least three broadly-stated reasons why the writ should be granted, each of which will be argued subsequently and in turn; these reasons are:

1. This case presents an important question of federal law that has not been , but should be, settled by the Supreme Court

2. As a result of the lack of uniformity of decisions among the several circuits, the extent to which a state prisoner is obliged to exhaust state remedies before being adjudged as entitled to seek federal habeas relief now hinges partly upon the circuit in which the prisoner's habeas corpus petition is filed and partly upon the state within the circuit which rendered the judgment that the prisoner seeking habeas relief seeks to attack.

3. The doctrine of separation of governmental powers, if recognized and applied in cases such as this would result, inevitably and almost automatically, in a uniformity of decisions among the courts of the several circuits on the question of how and in what manner the requirement of exhaustion of state remedies is to be decided in all cases in which exhaustion concepts are applicable.

We turn to the first of these three reasons.

1. This case presents an important question of federal law that has not been, but should be, settled by the Supreme Court.

There is a conflict among the Circuit Courts of Appeals and state courts concerning the meaning of provisions of federal law; specifically those provisions of federal law embodied in 28 U.S.C. § 2254(b)(3) which mandate that "[a] State shall not be deemed to have waived the exhaustion

requirement or be estopped from reliance upon the requirement unless the State, through counsel expressly waives the requirement."

The conflict concerning the meaning of the language of the quoted statute exists among the Courts of Appeals of the several Circuits. *See, e.g.*, *Jones v. Jones*, 153 F.3d 285, 299 (5th Cir. 1998) (". . . although AEDPA gives a federal court the discretion to *deny* [unexhausted] claims on the merits . . . it does not authorize . . . *granting* habeas relief on unexhausted claims."), *Lott v. Coyle*, 261 F.3d 594 (6th Cir. 2001), *Hoxsie v. Kerby*, 108 F.3d 1239 (10th Cir. 1997) *certiorari denied*, 522 U.S. 844, 118 S. Ct. 126, 139 L. Ed. 2d 77 (1997) (It is appropriate to address the merits of habeas corpus petitions notwithstanding failure to exhaust available state remedies, if interests of comity and federalism will be better served by addressing merits forthwith; if Court of Appeals is convinced that petition has no merit, belated application of exhaustion rule might simply require useless litigation in state courts).

The responsibility for resolution of such conflicts rests with the Court; the Court has plainly so stated:

> A principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law. See this Court's Rule 10.1. With respect to federal law apart from the Constitution, we are not the sole body that could eliminate such conflicts, at least as far as their continuation into the future is concerned. Obviously Congress itself can eliminate a conflict concerning a statutory

> provision by making a clarifying amendment to the statute, . . . Ordinarily, however, we regard the task as initially and primarily ours."

Braxton v. U.S., 500 U.S. 344, 347-48, 111 S. Ct. 1854, 1857, 114 L. Ed. 2d 385 (1991).

The circumstances which seem to have given rise to the conflict between and among the courts appears to have had its genesis in the AEDPA amendments to federal habeas corpus law which Congress enacted in 1996.

Those amendments were, in part, in evident response by the Congress to a concern which had arisen in past habeas cases where the states had been deemed by the federal courts to have "waived" the issue of exhaustion of state remedies through a failure to raise the issue in the state's answer. The Congress added to the law the provision that the issue of exhaustion would not be regarded as waived or excused unless the state, acting through its counsel in a particular case, expressly waived the issue on the record in the particular proceeding. 28 U.S.C. § 2254(b)(3).

2. As a result of the lack of uniformity of decisions among the several circuits, the extent to which a state prisoner is obliged to exhaust state remedies before being adjudged as entitled to seek federal habeas relief now hinges partly upon the circuit in which the prisoner's habeas corpus petition is filed and partly upon the state within the circuit which rendered the judgment that the prisoner seeking habeas relief seeks to attack.

The conflict among the circuits has been exacerbated by the unilateral actions of several of the states, taken most largely through the supreme courts of those states to relieve those states' highest courts from the burden of ruling upon the final step of the exhaustion process which Congress, in enacting and amending 28 U.S.C. § 2254(b)(3) had declared was required.

An illustrative partial analysis of the variant results and conclusions resulting from these several unilateral state responses to the amended federal habeas corpus statute was undertaken by the District Court in this case and appears in that Court's opinion, reproduced elsewhere in this petition. *See Blasi v. Attorney General of Pennsylvania*, 120 F. Supp.2d 451, 465-469 (M.D. Pa. 2000) (Appendix B, 27a-38a).

From the District Court's analysis of the results produced by the unilateral actions of the several states which, thus far, have acted, it is plain that a state prisoner's entitlement to federal habeas relief seems now to hinge partly upon the circuit in which the prisoner's habeas corpus petition is filed and partly upon the state within the circuit which rendered the judgment that the prisoner seeking habeas relief seeks to attack.

3. The doctrine of separation of governmental powers, if recognized and applied in cases such as this would result, inevitably and almost automatically, in a uniformity of decisions among the courts of the several circuits on the question of how and in what manner the requirement of exhaustion of state remedies is to be decided in all cases in which exhaustion concepts are applicable.

In the context of subsection 2254(b)(3) this case presents the further question of whether, despite the explicit language of 28 U.S.C. § 2254(b)(3), the judicial branch of a state's government can, in advance of the filing of a particular habeas case, preempt the entitlement which the Congress has stated should be exercised only by the executive branch of the state's government, to determine whether or not the requirement of exhaustion of state remedies should, in the particular case, be waived.

It should be recognized at the outset that the answer to this further yet subordinate question is likely to entail an examination into whether the preemptive activities of the state judiciary constitute a violation of Article IV of the Constitution of the United States whereunder each state was guaranteed the republican form of government. This question was recognized by the Court in *New York v. United States*, 505 U.S. 144, 112 S. Ct. 2408, 2433, 120 L. Ed. 2d 120 (1992) but was neither addressed nor resolved in that decision.

The question involving the guarantee clause of Article Four is a question which can and should be addressed and resolved here. And here it will become evident that the basis frequently employed by the Court to avoid addressing guarantee clause issues in past cases:

> *that the Congress and not the Court should handle guarantee clause problems,*

is not a reasonable basis for avoidance of the issue here because the Congress already *has* spoken to the problem and how it should be handled but the Supreme Court of Pennsylvania declares itself, in essence, not to be bound by the congressional directive.

In amending 28 U.S.C. § 2254 through inclusion of the new provisions of subsection (b)(3) Congress entrusted to the executive branch of state government the responsibility for deciding whether the congressionally-imposed requirement of exhaustion should or should not be waived in a particular case. The District Court, in the instant case, recognized the underlying basis for congressional entrustment of this decision to the executive (rather than to the judicial) branch of state government:

> . . . While it is the courts of a state that are faced with the burden of extra (or at least more comprehensive) applications for discretionary review, and it is for the benefit of the state courts that the principle of comity usually applies, it is the executive that litigates those cases on behalf of the people of the state, and it may be that the executive does not wish to forgo a round of litigation, especially if that litigation might further narrow the issues for habeas review.

Appendix at p. 36a. Once the District Court recognized the likely basis upon which Congress entrusted to the executive arm of state government the responsibility for deciding, on a case by case basis, whether the exhaustion requirement should be waived, the District Court was obliged to do more

than simply *assume* the validity of a decision by the judicial arm of a state's government to ignore so clear a congressional directive.

Moreover, in utilizing the concept of comity as a partial basis for assuming that the action of the state judiciary was probably valid (without really deciding whether or not the action of the state judiciary actually was valid) the district court rested its comity assessment upon an unnecessarily narrowed view of comity. The District Court stated that ". . . it is for the benefit of the state courts that the principle of comity *usually* applies . . ." (italics supplied) but what the district court failed to recognize is that in a context such as this, when applying principles of comity, the vital interests of the executive branch of state government must be fully considered as well. *Calderon v. Thompson*, 523 U.S. 538, 552, 118 S. Ct. 1489, 1499, 140 L. Ed. 2d 728 (1998) (". . . Comity is not limited to the judicial branch of a state government. . . . [T]he Court . . . should have [more fully] considered as well the [] more vital interests of [the] executive branch.")

When the foregoing factors:

- the view of comity announced by *Calderon v. Thompson*, *supra* and
- the recognition of Congress' intention in entrusting the decision-making process to the state's executive branch (rather than to the state's judicial branch)

are coupled with

- the clarity with which the District Court initially applied ". . .the language actually

employed by the Supreme Court of the United States. . ." in *O'Sullivan v. Boerckel*, 526 U.S. 838, 119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999) by declaring:

> In this case, since our inquiry depends on whether discretionary review is an "available" procedure under Pennsylvania law, we believe our answer must be "yes" because allocatur is analogous to the discretionary review which the Supreme Court found to be "available" under Illinois law. The order issued by the Supreme Court of Pennsylvania does not make allocatur unavailable, since the actual procedure, scope of review, etc., has not changed.

Blasi v. Attorney General of Pennsylvania, 120 F. Supp.2d 451, 468 (M.D.Pa. 2000). (Appendix at p. 35a), there would seem to be scant basis for the circuitous struggle undertaken by the district court to conclude (quite incorrectly we contend) that ". . . the order of the Supreme Court of Pennsylvania removes a petition for allocatur from the one complete round of Pennsylvania's established appellate review process." *Id.* 120 F. Supp.2d 451, 469. Appendix at p. 38a)

The district court stated that 'another way to view this problem is by questioning whether a state's high court has the authority to waive the exhaustion requirement.' Such statement merits examination through an approach mildly different than the approach pursued by the district court: The Supreme Court has plainly stated: "Comity, in

these circumstances, dictates that [the state prisoner] use the State's established appellate review procedures before he presents his claims to a federal court." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845, 119 S. Ct. 1728, 1733, 144 L. Ed. 2d 1 (1999).

Such statement warrants (and perhaps even *mandates*) inquiry into the legitimacy of the process by which a State's appellate review procedures can be deemed to be the State's *established* appellate review procedures.

If appellate review procedures are found to have been "established" in a manner that is in itself an unconstitutional method for establishing such appellate review procedures, it would necessarily seem to follow that any portion of the appellate review procedures established by an unconstitutional method or through unconstitutional means ought properly to be regarded as having no force and effect under any circumstances. This being the case, consideration of notions such as whether the constitutionally invalid order might or might not be regarded as operating retroactively, are not proper as a basis for deciding the effect of such order in a given proceeding.

The truism that it is the Congress and not the Courts which establishes the means by which federal habeas corpus relief may be sought is a proposition not open to serious question. *Preiser v. Rodriguez*, 411 U.S. 475, 93 S. Ct. 1827, 36 L. Ed. 2d 439 (1973) (Congress has determined that habeas corpus is the appropriate remedy for state prisoners attacking the validity of fact or length of their confinement, and is the exclusive remedy where clearly applicable). When Congress has particularly described and specified the sole manner and means by which the requirement of exhaustion of state remedies may be waived by a state, neither the federal courts

nor the courts of any particular state are free to ignore that which Congress has described and specified. *Preiser v. Rodriguez, supra.*

Congress has specified that exhaustion of state remedies may not be waived except through action of the *executive branch of state government* acting through counsel for the state. If in any particular state, in this case Pennsylvania, the *judicial branch of state government* purports to usurp a function (that of waiving the exhaustion requirement) which Congress has entrusted to the executive branch of the state's government, there occurs a violation of the doctrine of separation of governmental powers. Under this separation of powers doctrine, the legislative department, the executive department and the judicial department of government are each obliged[1] to avoid intrusion into the areas of governmental responsibility properly exercisable by one of the other two branches of government.

Such violation is an unconstitutional violation because the provisions of Article IV, Section 4 of the Constitution of the United States guarantees to each state a republican form of government and the doctrine of separation of governmental powers has been held to constitute an integral element of the republican form of government contemplated by Article IV. *Vansickle v. Shanahan*, 212 Kan. 426, 511 P.2d 223 (1973).

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1. As between the judicial branch of government and the executive branch the text-writers have noted explicit limitations on the judiciary: "The judicial branch may interfere with administrative activities of the executive branch only when necessary to protect individual constitutional rights, or where a statute has imposed a specific duty on the courts with respect to them, and not otherwise." 16 C.J.S. 649-50, Constitutional Law § 203.

In deciding *New York v. United States*, 505 U.S. 144, 112 S. Ct. 2408, 2433, 120 L. Ed. 2d 120 (1992), the Supreme Court found it unnecessary to decide whether or not, despite *Luther v. Borden*, 7 How. 1, 12 L. Ed 581 (1849), a claim arising under the guarantee clause of Article IV should continue to be regarded as non-justiciable. In this case such a decision should be made, and under the facts of this case the decision can be a limited decision. Here the question of justiciability can be narrowed to avoid the line of reasoning which generally excludes the Court's consideration of "political" questions because the question here is not a "political" question, it is a "judicial" question and therefore a "non-political" question.

Mr. Justice STEWART, began his joinder in the dissenting opinion of Mr. Justice HARLAN in *Wesberry v. Sanders*, 376 U.S. 1, 50-51, 84 S. Ct. 526, 552-53 (1964) with the observation:

> I think it is established that "this Court has power to afford relief in a case of this type as against the objection that the issues are not justiciable," and I cannot subscribe to any possible implication to the contrary which may lurk in Mr. Justice HARLAN'S dissenting opinion. With this single qualification I join the dissent. . . .

This quotation is of significance in evaluating (in the justiciability context) the District Court opinion in that case [*Wesberry v. Vandiver*, 206 F. Supp. 276, *affirmed, sub nom. Wesberry v. Sanders*, 376 U.S. 1, 50-51, 84 S. Ct. 526, 552-53, 11 L. Ed. 2d 481 (1964)] as well as the opinions of the District Court and The Supreme Court in *Bush v. Martin*, 224 F. Supp. 499, *affirmed, sub nom. Martin v. Bush*, 376 U.S. 222, 84 S. Ct. 709, 11 L. Ed. 2d 656 (1964).

The District Court opinion in *Wesberry v. Vandiver*, 206 F. Supp. 276, 282 made the following observation apropos to concepts of justiciability of cases arising as the result of a violation or deprivation of the republican form of government guaranteed by Section 4 of Article IV of the United States Constitution: "If the state action . . . offends fundamental political concepts inherent in a republican form of government . . . the [state] statute must be stricken. . . ."

It would seem beyond serious question that the doctrine of separation of governmental powers is one of the ". . . fundamental political concepts inherent in a republican form of government . . ." to which, in *Wesberry v. Vandiver, supra*, the court was making reference. If so, it would follow that the action of the Pennsylvania Supreme Court in promulgating its Judicial Administration Order No. 218, an order which clearly offends the doctrine of separation of governmental powers[2], constitutes action by the state

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2. It was argued in the Third Circuit Court of Appeals that the Pennsylvania Supreme Court's Order is invalid for several additional reasons which also should be recognized.

A. The Pennsylvania Constitution, in Article 5, at section 2(c) limits the jurisdiction of the Supreme Court to that which the General Assembly establishes as the Court's jurisdiction and does so in the following unambiguous terms: "The Supreme Court . . . (c) shall have such jurisdiction as shall be provided by law." In seeking unilaterally to expand its own jurisdiction the Court violated this state constitutional provision.

B. Pa. Const. Art. V, § 10(c) explicitly limits the rule-making power of the Pennsylvania Supreme Court by prohibiting abridgement of the rights of *any* litigant: "(c) The Supreme Court shall have the power to prescribe general rules . . . [only] . . . if such rules are

(Cont'd)

judiciary ". . . which must be stricken." *Wesberry v. Vandiver*, *supra*. It can be seen from the foregoing decisions that there

(Cont'd)
consistent with this Constitution and neither abridge, enlarge nor modify the substantive rights of any litigant, nor affect the right of the General Assembly to determine the jurisdiction of any court. . . ." The Pennsylvania Supreme Court does not have the power, constitutionally, to adopt any rule, in the guise of an administrative order or otherwise, which abridges the rights of state respondents in federal habeas proceedings to demand full exhaustion. For this reason too, the Order is invalid.

C. apart from the noted violations of the Pennsylvania Constitution, the "justiciability" aspect of the resultant violation of the separation of powers doctrine deriving from such an improper construction of the administrative order has not merely one facet but three:

- (1) The Supreme Court of Pennsylvania has intruded into an area of governmental responsibility which Congress has declared to be in the sole province of the executive branch of Pennsylvania government.

- (2) The Supreme Court of Pennsylvania has intruded into an area of governmental responsibility which Article V § 2 of the Pennsylvania Constitution has declared to be in the sole province of the legislative branch of Pennsylvania government.

- (3) Any court adopting a view which validates the Supreme Court of Pennsylvania's administrative order will have intruded, in violation of the teachings of *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994) ("We are not free to fashion remedies that Congress has specifically chosen not to extend.") into an area of governmental responsibility which is the sole province of Congress as the legislative branch of federal government.

is plausible judicial reasoning to support the proposition (*Luther v. Borden*, *supra*, notwithstanding) that decisions more recent than *Luther* have regarded non-political questions to be justiciable. For convenience of terminology, cases such as those just cited will (consistently with language employed by Justice Harlan and shortly hereinafter to be quoted) be referred to as the "electoral cases.")

The manner in which the courts approached the electoral cases, and the concept that such cases are rooted in the guarantee of a republican form of government as set forth in Article IV, Section 4 of the United States Constitution illuminates the validity of the inquiry here into the proposition that a judicial question such as the one posed by the Administrative Order of the Pennsylvania Supreme Court need not be restricted by the "political question" doctrine with which the Court found itself obliged to struggle in the electoral cases.

In *Gray v. Sanders*, 372 U.S. 368, 83 S. Ct. 801, 9 L. Ed. 2d 821 (1963) Justice Harlan began his dissenting opinion with these words:

> When Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663, was argued at the last Term we were assured that if this Court would only remove the roadblocks of Colegrove v. Green, 328 U.S. 549, 66 S.Ct. 1198, 90 L.Ed.2d 1432, and its predecessors to judicial review in "electoral" cases, this Court in all likelihood would never have to get deeper into such matters. State legislatures, it was predicted, would be prodded

> into taking satisfactory action by the mere prospect of legal proceedings.
>
> These predictions have not proved true. . . .

Id. 372 U.S. 382, 83 S. Ct. 809.

When an effort is made to isolate, identify and define the those of the issues in *Baker v. Carr*, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962) which bear upon the issues here present we find once again that the Court's hesitancy arose because those cases, unlike the present one, involved "political questions" as the basis for the Court's non-justiciability[3] concerns; the present case does not involve "political" questions, only "judicial" questions.

Much of that which petitioner has sought to articulate as vindicating petitioner's argument concerning the *need for issuance* of the writ (and the utilization of the Guarantee Clause as the vehicle for clarifying that need) can be found on a single page of text and the authorities cited or revealed thereon: *American Constitutional Law* (2d Ed. 1988) Laurence H. Tribe, at page 398.

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3. It is *Colegrove v. Green*, 328 U.S. 549, 66 S. Ct. 1198, 90 L. Ed. 2d 1432 (1946) cited in the just-quoted portion of *Gray v. Sanders, supra* which leads us back to *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118, 32 S. Ct. 224, 56 L. Ed. 337 (1912) a decision which at 223 U.S. 143 f.f. leads us into an expansive analysis of *Luther v. Borden*, 7 How. 1, 12 L. Ed. 581 (1849) and the limitations on meaningful allowance by the federal courts of relief under Article IV, Section 4 which until the Court's opinion in *New York v. United States*, 505 U.S. 144, 112 S. Ct. 2408, 2433, 120 L. Ed. 2d 120 (1992), it was believed that *Luther v. Borden, supra* imposed.

The likeliest argument *against* the Court's consideration of *this* question in *this* case might be that the courts have an obligation to avoid deciding the constitutional question if the Pennsylvania Supreme Court's standards for its official conduct (in promulgating Order No. 218) can be disposed of on other grounds, as was done here; the Court of Appeals disposed of the question on the non-constitutional basis that the order lacked retroactive effect and therefore was not applicable.

Petitioner urges the Court to evaluate this separation of governmental powers question with the same line of approach that the Court has utilized in evaluating claims of qualified immunity. *See Wilson v. Layne*, 526 U.S. 603, 609, 119 S. Ct. 1692, 1697, 143 L. Ed. 2d 618 (1999) and cases cited therein, where the Court explained the reasons why, in such cases, the usual policy of avoiding decisions on constitutional questions need not always be followed: ". . . Deciding the constitutional question before addressing the qualified immunity question also promotes clarity in the legal standards for official conduct, to the benefit of both the officers and the general public." *Wilson v. Layne*, *supra*.

If the Court determines to grant certiorari here, such determination will have the effect of promoting a uniformity of decisions such that the courts will no longer be obliged to guess, as the District Court Judge was obliged to guess in this case, how dictum to be gleaned from concurring or dissenting opinions in decisions such as *O'Sullivan* might be applied to figure out, not whether a State Supreme Court was acting *lawfully*, but whether such State Supreme Court might logically be regarded as having "lawfully circumvented" the will of Congress.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM P. O'MALLEY*
Assistant District Attorney
Eugene M. Talerico
First Assistant District Attorney
Andrew J. Jarbola, III
District Attorney
Lackawanna County District
Attorney's Office
Lackawanna County Courthouse
200 North Washington Avenue
Scranton, Pennsylvania 18503
(570) 963-6717

Respectfully submitted February 5, 2002.

APPENDIX

APPENDIX A — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED SEPTEMBER 6, 2001 AND FILED SEPTEMBER 28, 2001

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

00-3527

JOHN JOSEPH BLASI,

Appellant

v.

ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

(D.C. Civ. No. 98-cv-01545)
District Judge: The Honorable James F. McClure, Jr.

Submitted Under Third Circuit Rule 34.1(a)
September 6, 2001

Before: BECKER, *Chief Judge*, ALITO and BARRY, *Circuit Judges*

(Filed: SEP 28 2001)

Appendix A

MEMORANDUM OPINION

ALITO, *Circuit Judge*:

This is an appeal from a District Court order denying a petition under 28 U.S.C. § 2254 for a writ of habeas corpus. Our court granted a certificate of appealability on two substantive issues: first, whether trial counsel was ineffective in failing to secure a transcript of the preliminary hearing for use in cross examination of the child witness at trial, and second, whether trial counsel was ineffective in failing to object to alleged prosecutorial misconduct by the district attorney. The District Court addressed the first claim on the merits, concluding that trial counsel had a reasonable strategic ground for not requesting that a transcript be prepared. We affirm the rejection of this claim for essentially the reasons given by the District Court.

We affirm the rejection of the second claim on the basis of procedural default. The petitioner does not contend that this claim was ever presented to the Pennsylvania Supreme Court but he argues that, by virtue of the Pennsylvania Supreme Court's Order of May 9, 2000, *In re: Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases*, No. 218, presentation to the Pennsylvania Supreme Court was not required. In *Wenger v. Frank*, No. 99-3337 (3d Cir., filed August 27, 2001), however, we held that this order lacks retroactive effect. Accordingly, it is inapplicable in the present case, and it therefore follows that the petitioner did not properly exhaust his state remedies. The petitioner does not contend that he could now return to the Pennsylvania courts and raise this claim; nor does he advance any basis

for excusing procedural default. We therefore hold that this claim is procedurally defaulted, and we affirm the District Court's rejection of the claim on that ground.

For the reasons set out above, the decision of the District Court is affirmed.

TO THE CLERK OF THE COURT:

Kindly file the foregoing Memorandum Opinion.

s/ illegible
Circuit Judge

Appendix A

UNITED STATES COURT OF APEALS
FOR THE THIRD CIRCUIT

00-3527

JOHN JOSEPH BLASI,

Appellant

v.

ATTORNEY GENERAL OF THE
STATE OF PENNSYLVANIA

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE MIDDLE DISTRICT
OF PENNSYLVANIA

(D.C. Civ. No. 98-cv-01545)
District Judge: The Honorable James F. McClure, Jr.

Submitted Under Third Circuit Rule 34.1(a)
September 6, 2001

Before: BECKER, *Chief Judge*, ALITO and BARRY, *Circuit Judges*

(Filed: SEP 28 2001)

Appendix A

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was submitted under Third Circuit LAR 34.1(a) on September 6, 2001.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the District Court entered on September 18, 1998 be and the same is hereby affirmed.

Costs are taxed against appellant.

ATTEST:

Clerk

Dated: September 28, 2001

APPENDIX B — MEMORANDUM, OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA DATED AND FILED OCTOBER 2, 2000

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

NO. 4:CV-98-1545
(Judge McClure)
(Magistrate Judge Durkin)

JOHN JOSEPH BLASI,

Petitioner

v.

ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA,

Respondent

MEMORANDUM

October 2, 2000

BACKGROUND:

On September 18, 1998, petitioner John Joseph Blasi, an inmate at the State Correctional Institution at Waymart, Wayne County, Pennsylvania, commenced this action with the filing of a petition for a writ of habeas corpus under 28 U.S.C. § 2254. Blasi was convicted in 1994 in the Court of

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Common Pleas of Lackawanna County of four counts of involuntary deviate sexual intercourse, two counts of indecent assault, and one count each of corruption of a minor, endangering the welfare of a child, and indecent exposure. Two consecutive terms of incarceration for a period of 60 to 120 months were imposed, combining various counts relative to each term. Blasi's total sentence was 120 to 240 months' incarceration.

On direct appeal, the Superior Court affirmed the judgment of conviction and sentence, *Commonwealth v. Blasi*, 663 A.2d 244 (Pa. Super. Ct. 1995) (table), and the Supreme Court denied a petition for allocatur, *Commonwealth v. Blasi*, 666 A.2d 1050 (Pa. 1995) (table). Before the Supreme Court ruled, Blasi filed a petition under the state Post Conviction Relief Act (PCRA), 42 Pa. Cons. Stat. Ann. §§ 9541 et seq., which was denied by the trial court. The Superior Court again affirmed, *Commonwealth v. Blasi*, 711 A.2d 1037 (Pa. Super. Ct. 1998) (table), and the Supreme Court again denied allocatur. *Commonwealth v. Blasi*, 727 A.2d 127 (Pa. 1998) (table). [Hereafter, written opinions of the state courts before which Blasi appeared are cited in their unpublished form.]

A prior action by Blasi challenging the jury selection process in Lackawanna County under 42 U.S.C. § 1983 was dismissed because § 1983 is an improper vehicle for challenging the validity of a state conviction. *Blasi v. Barrasse*, No. 4:CV-94-0757 (M.D.Pa. Sept. 6, 1994) (relying on *Heck v. Humphrey*, 129 L.Ed.2d 383 (1994)).

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Blasi filed the original petition *pro se*, but we appointed counsel in an order (with an accompanying memorandum) issued on December 17, 1998. Before service was made, the petition was reviewed by U.S. Magistrate Judge Raymond J. Durkin, who recommended that the petition be dismissed as untimely in part and otherwise for failure to exhaust state remedies. We adopted the report and recommendation as amended by our Memorandum and Order of Court dated December 17, 1998. The petition was dismissed as a mixed petition under *Rose v. Lundy*, 455 U.S. 509 (1982), and it progeny. However, we appointed counsel and granted leave to file an amended petition, to proceed only with the exhausted claims, or to return to state court to exhaust further claims. *Blasi v. Attorney General of Commonwealth of Penna.*, 30 F.Supp.2d 481 (M.D. Pa. 1998).

An amended petition for a writ of habeas corpus was filed on April 14, 1999, and Magistrate Judge Durkin thereafter directed a response to the petition. The Office of the Attorney General of Pennsylvania referred the matter to the District Attorney for Lackawanna County, and that office represents the Commonwealth.

Before the court is a second report and recommendation by Magistrate Judge Durkin, which recommends that the petition be denied.

Appendix B

DISCUSSION:

I. STANDARD: REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE

A district court is required to review *de novo* those portions of a magistrate judge's report to which objections are made. *Commonwealth of Penna. v. United States*, 581 F.Supp. 1238, 1239 (M.D. Pa. 1984); 28 U.S.C. § 636(b)(1). When no objections are filed to the report of a magistrate judge, a court has discretion to review that report as it deems appropriate. A magistrate judge's finding or ruling on a motion or issue properly becomes the holding of the court unless objections are filed. *Thomas v. Arn*, 474 U.S. 140 (1985). However, the district court may not grant a motion for summary judgment, Fed.R.Civ.P. 56, or a motion to dismiss under Fed.R.Civ.P. 12(b)(6) solely because the motion is unopposed; such motions are subject to review for merit. *Stackhouse v. Mazurkiewicz*, 951 F.2d 29, 30 (3d Cir. 1991); *Anchorage Associates v. Virgin Islands Board of Tax Review*, 922 F.2d 168, 174 (3d Cir. 1990).

Blasi has objected to the report and recommendation as it addresses each of his claims; we therefore review the matter *de novo*.

II. STATEMENT OF FACTS

To explain the relationships among the persons involved and to place events into context, we begin with events occurring well before the incidents giving rise to the charges against Blasi. In 1983, Blasi's divorce from his first wife

became final. He met and began to date Joanne Kester, and moved in with her in 1984. They resided in Scranton, Pennsylvania. Joanne had two sons, David and Michael. While both were Joanne Kester's sons, they had different fathers. Joanne's first husband, Francis Kester, adopted David as his son. Francis Kester is Michael Kester's natural father.

In 1988, Blasi married Joanne and became the stepfather of David and Michael. At the time of the marriage, Michael was nine or ten years old.[1] That same year, Blasi injured his right shoulder while working as a nurse's aide. He testified during his trial that the injury never fully healed.

Apparently, the marriage was stormy. There was testimony at trial that Blasi physically abused his wife and stepsons, and both Blasi and Joanne testified that they argued frequently. In 1991, Joanne filed for a protection-from-abuse ("PFA") order, and Blasi was required to stay away from her. On the day before a hearing related to the PFA order, Blasi filed a complaint for divorce. A reconciliation was effected, however, and Blasi returned to Joanne's home.

On January 27, 1992, Blasi injured his left shoulder while working at a furniture company, after which he was on

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1. In his testimony, Michael estimated his age at the time of the marriage. At the start of his testimony, he indicated that he was fourteen years old, N.T. 1/12/94 (record document no. 24) at 37, and later stated that his birthday is in March. *Id.* at 62. He therefore would have turned fifteen in March, 1994, and from this we conclude that Michael was born in March, 1979. When the incidents in question began in February or early March, 1992, he would have been twelve, and turned thirteen during the period encompassing the incidents in question.

"disability" for a period of time. Blasi had to undergo medical treatment and physical therapy, and his arm was in a sling for at least part of the time. According to Blasi's own testimony, the injury mostly affected the range of motion in the arm.

Throughout this period, David Kester, the older of Joanne's sons, had disciplinary problems. In an attempt to address those problems, Joanne went to Lackawanna County Children and Youth Services (CYS). One of the measures attempted was to send David to live with an aunt, Joanne's sister, in the Allentown area. Once there, David told the aunt that there might be problems with Blasi being at home alone with Michael. The aunt called Joanne and advised her to seek counseling for Michael, which Joanne did.

After initial reticence, Michael told the counselor, Robert Frein, of incidents which occurred at home while his mother was working. These consisted of Blasi watching pornographic movies and masturbating, then having Michael masturbate. During subsequent interviews with Frein and either police or CYS personnel, Michael related that the incidents also involved Blasi touching Michael (including both masturbation and performing oral sex), and vice versa. Eventually, Michael told of two instances in which Blasi anally penetrated Michael.

Michael was unable to specify the dates on which the incidents, numbering either four or five altogether, took place. However, they began in either late February or early March, 1992, and ended in late March or April of the same year. Michael estimated the dates based on their relation to his birthday.

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After a jury trial in the Court of Common Pleas of Lackawanna County,[2] Blasi was found guilty of involuntary deviate sexual anal intercourse, involuntary deviate sexual intercourse, involuntary deviate oral intercourse (two counts), corruption of minors, endangering the welfare of children, indecent assault (two counts), and indecent exposure. Blasi was sentenced to two consecutive 5 to 10 year terms, each grouping various counts, for a total sentence of incarceration of 10 to 20 years.

III. STANDARD: HABEAS CORPUS REVIEW AFTER AEDPA

The Commonwealth contends that Blasi has not exhausted his remedies in the state courts, so that the petition should be dismissed. Blasi argues that his claims have been exhausted and should be addressed on the merits. The court has authority to address unexhausted claims if the petition is denied. We therefore set forth the standards for exhaustion and for addressing a claim on the merits. Since the petition was filed after its effective date, the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104-132, 110 Stat. 1217 (Apr. 24, 1996), govern. *Williams v. Taylor*, 120 S.Ct. 1479, 1486 (2000); *Lindh v. Murphy*, 521 U.S. 320, 326-327 (1997); *Weeks v. Snyder*, 219 F.3d 245, 256 (3d Cir. 2000).

Also, each of Blasi's claims asserts ineffective assistance of counsel based on a purported deficiency on the part of

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2. The trial judge was the Honorable James M. Munley, now a judge of this court.

either trial or appellate counsel. We therefore set forth the standard governing claims of ineffective assistance.

(A) Exhaustion

The statutory provision governing exhaustion of remedies by a state prisoner challenging his or her conviction reads:

> **(b)(1)** An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that —
>
> > **(A)** the applicant has exhausted the remedies available in the courts of the State; or
> >
> > **(B)(i)** there is an absence of available State corrective process; or
> >
> > **(ii)** circumstances exist that render such process ineffective to protect the rights of the applicant.
>
> **(2)** An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.
>
> **(3)** A State shall not be deemed to have waived the exhaustion requirement or be estopped

> from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

28 U.S.C. § 2254(b).

"Absent a valid excuse, a habeas petitioner must present all federal claims to the state courts." *Coss v. Lackawanna County D.A.*, 204 F.3d 453, 460 (3d Cir. 2000) (*en banc)*; citing § 2254(b); *Rose v. Lundy*, 455 U.S. 509 (1982)). The exhaustion requirement serves the interest of comity and preserves the role of state courts in protecting federally guaranteed rights by allowing state courts to have the first opportunity to entertain federal constitutional challenges. *Id.* (quoting *Evans v. Court of Common Pleas*, 959 F.2d 1227, 1230 (3d Cir. 1992), *cert. dismissed*, 506 U.S. 1089 (1993); further citation omitted).

Claims asserted in a petition under § 2254 are exhausted if the petitioner "fairly presented" the claims to each level of the state courts. *Lines v. Larkins*, 208 F.3d 153, 159 (3d Cir. 2000). A claim is fairly presented for purposes of exhaustion if both the legal theory and the facts underpinning the federal claim have been presented to the state courts and the same method of legal analysis to be applied in federal court was available to the state courts. *Evans* at 1231. While the petitioner need not cite "book and verse" of the Constitution, a "somewhat similar state-law claim" is insufficient. *McCandless v. Vaughn*, 172 F.3d 255, 261 (3d Cir. 1999). The factual and legal substance of the claim must be presented in such manner as to put the state courts on notice that a federal claim is being asserted. *Id.*

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Some of the ways that a petitioner may fairly present a claim to the state courts without being explicit in asserting the claim as a federal constitutional claim include: "(a) reliance on pertinent federal cases employing a constitutional analysis, (b) reliance on state cases employing constitutional analysis in like fact situations, (c) assertion of the claim in terms so particular as to call to mind a specific right protected by the Constitution, and (d) allegation of a pattern of facts that is well within the mainstream of constitutional litigation." *McCandless* at 261-262 (citing *Evans* at 1232, which in turn quoted *Daye v. Attorney General of New York*, 696 F.2d 186 (2d Cir. 1982) (*en banc*)).

The petitioner bears the burden of establishing exhaustion of state remedies. *Lines* at 159.

(B) Review of Merits of Claims

If a petitioner has exhausted all of the claims in his or her petition, the federal court on habeas review may consider the merits of the claims, as provided in the following statutory language:

> **(d)** An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —
>
> > **(1)** resulted in a decision that was contrary to, or involved an unreasonable

> application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> **(2)** resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

A state court decision is "contrary to" Supreme Court precedent if: (1) the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law, that is, if the state court applies a rule that contradicts the governing law set forth in Supreme Court opinions; or (2) the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to that of the Supreme Court. *Williams v. Taylor*, 120 S.Ct. 1495, 1519-1520 (2000). A state court decision involves an "unreasonable application of" Supreme Court precedent if the state court's application of clearly established federal law was objectively unreasonable, as opposed to erroneous or incorrect. *Id.* at 1521-1522.

(C) Ineffective Assistance of Counsel

A criminal defendant has a right to the effective assistance of counsel under the Sixth Amendment to the Constitution of the United States. "A defendant claiming ineffective assistance of counsel must show (1) that counsel's representation 'fell below an objective standard of reasonableness,' . . . and (2) that counsel's deficient

performance prejudiced the defendant . . ." *Roe v. Flores-Ortega*, 120 S.Ct. 1029, 1034 (2000)(citing *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984)). *See also Weeks* at 20.

In determining whether counsel's conduct is reasonable, a court must judge counsel's conduct in the context of the facts of the particular case, viewed as of the time of counsel's conduct, and must be highly deferential. *Flores-Ortega* at 1034-1035 (citing *Strickland* at 688-690, 104 S.Ct. 2052). When the claim of ineffective assistance is based on conduct during the course of a legal proceeding, the defendant demonstrates prejudice by establishing a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 1037; *Weeks* at 20. A "reasonable probability" is one sufficient to undermine confidence in the outcome of the proceeding. *Weeks* at 25; *Coss* at 462.

IV. BLASI'S CLAIMS

The claims Blasi asserts in his amended petition are:

I. Blasi was denied his Sixth Amendment right to effective assistance of pretrial and trial counsel.

A. Pretrial and trial counsel were ineffective for failing to secure a transcript of the preliminary hearing.

B. Pretrial and trial counsel were ineffective for failing to properly object to prosecutorial misconduct.

C. Pretrial and trial counsel were ineffective for failing to make and preserve appropriate objections.

D. Pretrial and trial counsel were ineffective for failing to file post-trial motions.

E. Pretrial and trial counsel were ineffective for failing to conduct reasonable and necessary pretrial preparation and investigation.

F. Pretrial and trial counsel were ineffective for failing to file pretrial motions raising a constitutionally defective jury selection process.

Amended Petition for Writ of Habeas Corpus at 2-3 ¶ 3. Each of these claims will be reviewed in turn for exhaustion as well as a review on the merits, if appropriate.

V. PRELIMINARY HEARING TRANSCRIPT

On direct appeal, Blasi argued that trial counsel was ineffective for failing to obtain a transcript of the preliminary hearing. The Superior Court addressed the argument in a succinct manner:

Appellant's claim that trial counsel was ineffective for failing to obtain a transcript of the preliminary hearing must also be rejected. To prevail on a claim of ineffectiveness it must be demonstrated that counsel's action or inaction was prejudicial. See: *Commonwealth v. Hilton*, 400 Pa. Super.

579, 585, 584 A.2d 334, 337 (1990); *Commonwealth v. Rollins*, 525 Pa. 335, 344, 580 A.2d 744, 748-749 (1990); *Commonwealth v. Craig*, 345 Pa. Super. 542, 547, 498 A.2d 957, 959 (1985). Appellant has failed to demonstrate that he was prejudiced by the absence of a preliminary hearing transcript.

Commonwealth v. Blasi, No. 988 Philadelphia 1994, slip op. at 6 (Pa. Super. Ct. Apr. 28, 1995) (Exhibit C to record document no. 4). Of course, the Supreme Court of Pennsylvania did not address the issue since the petition for allocatur was denied.

The issue was raised a second time by Blasi in his PCRA petition. The trial court declined to address the issue as having been "previously litigated" under the PCRA. *Commonwealth v. Blasi*, No. 93 CR 96, slip op. at 10 (C.P. Lackawanna Cty. Mar. 20, 1997). *See also* 42 Pa. Cons. Stat. Ann. § 9544. On appeal from the denial of relief under the PCRA, the Superior Court found that the issue was previously litigated. *Commonwealth v. Blasi*, No. 1512 Philadelphia 1997, slip op. at 7 (Pa. Super. Ct. Jan. 30, 1998). However, it went on to address the issue, finding it to be "without merit." *Id.* Its reasoning was that it was not clear that Blasi actually expressed a desire that a transcript be requested since counsel testified that, had such a request been made, counsel would have deferred to the client's wish. Regardless, trial counsel's decision not to request that the preliminary hearing be recorded or transcribed was not unreasonable. *Id.* at 7-8.

As counsel pointed out, in child sexual assault cases, a victim may not come forward or may have problems with recollection. If the victim does not come forward, the

Commonwealth may introduce former testimony.[3] *Id.* at 8. To this, we would add that counsel is correct that recording and/or transcribing testimony at a preliminary hearing is a two-edged sword: The testimony may be used for impeachment, but it also may be used to buttress testimony as a recollection recorded when the event was fresh in the witness' mind. *See* Pa. R. Evid. 803.1(3) and Comment n. 3 (allowing use of recorded recollection when witness has insufficient present recollection; Rule consistent with Pennsylvania case law predating Blasi's trial).

This claim gives rise to several issues. First, it appears that it was only at the PCRA stage that Blasi first claimed that there was prejudice arising from the failure to order the transcript. At that time, Blasi claimed that Michael testified at the preliminary hearing that the incidents took place on Saturdays, which would contradict his trial testimony that he did not know the days of the week on which the incidents occurred. Also, limiting the possible days on which the incidents occurred would have given Blasi a better chance of establishing an alibi. Therefore, the claim of ineffective assistance was not presented in the same manner on direct appeal as in its later incarnation, i.e. with specific instances of purported prejudice, and therefore was not exhausted in the form in which it now is presented.

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3. *See generally* 42 Pa. Cons.Stat. Ann. § 5917 (allowing former testimony to be admitted under certain circumstances); *Commonwealth v. Melson*, 637 A.2d 633, 637-638 (Pa. Super. Ct.) (former testimony admissible when witness unavailable through no fault of prosecution; unavailability not limited to situations described in § 5917), *allocatur denied*, 647 A.2d 509 (Pa. 1994) (table). The rule now is embodied in Pa. R. Evid. 804(b)(1).

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In affirming the denial of PCRA relief, the Superior Court went on to consider the merits of the claim despite finding that the claim was previously litigated. The magistrate judge concluded that this was the last state court to consider the claim on the merits, and therefore reviewed the claim on the merits, applying the "unreasonable application" standard. The Superior Court, however, expressed doubt of its own authority to consider the claim once it found the claim previously litigated. It is questionable, then, that the Superior Court's discussion may be considered a proper discussion of the merits.

Another issue arises with respect to whether Blasi failed to develop the factual basis for the claim in state court. *See* 28 U.S.C. § 2254(e)(2). Since Blasi did not establish of record the testimony from the preliminary hearing which was necessary at trial, he did not establish prejudice on direct appeal. The PCRA court did not reach the merits of the claim at all, and the Superior Court addressed only the conduct of counsel as falling below the minimum level of competence. Neither court found that Michael in fact testified as Blasi now claims that he did at the preliminary hearing.

Regardless of these issues, we will address the claim on the merits because we have the authority to do so under § 2254(b)(2).

The decision by counsel was made before the preliminary hearing, and it is the facts and circumstances then known to counsel which must be the context in which the decision is considered. At that time, counsel would know that his client was charged with several instances of sexual assault on a

minor, and that the minor will testify and describe the incidents which gave rise to the charges. While it is true that a transcript of that testimony may contain impeachment material, it is also true that preserving the testimony will give the Commonwealth a record of the testimony should the victim not appear at trial. Further, there would be a record of the testimony closer in time to the events for purposes of proving events which may fade from the victim's testimony. Anticipating that a child victim will not appear for trial for fear of facing his abuser or out of embarrassment, or that a child victim would have a loss of memory of even important events, seems to us a reasonable view.

Again, this type of evidence presents a two-edged sword. There may be impeachment material, or evidence which would support an affirmative defense such as an alibi. Conversely, there also may be damaging evidence which is preserved for introduction at trial when it otherwise might be unavailable. The unavailability is more likely in a case of child sexual assault. Counsel cannot know before the preliminary hearing whether the positive uses to which a transcript can be put would outweigh the negative effects to which preserving the testimony might give rise. Under such circumstances, it would be well within the range of conduct to be expected of competent counsel to decline to request a transcript of the proceedings at a preliminary hearing. Actually, the fact that a request must be made before a transcript or recording will be made of a preliminary hearing suggests strongly that such is not a matter of routine, so that counsel in this case cannot be said to be an exception in not obtaining a transcript of a preliminary hearing.

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Blasi is not entitled to relief on his claim that counsel was ineffective for failing to obtain a transcript of the victim's testimony at the preliminary hearing.

VI. PROSECUTORIAL MISCONDUCT

The magistrate judge concluded in the report and recommendation that Blasi failed to exhaust his state remedies with respect to the claim of ineffective assistance of counsel for failure to object to instances of prosecutorial misconduct. This conclusion was based on a finding that Blasi had not filed a petition for allocatur with the Supreme Court of Pennsylvania after the Superior Court affirmed the conviction on direct appeal. While this finding was in error because Blasi did, in fact, petition for allocatur, the claim still was not presented to the Supreme Court of Pennsylvania.

The Superior Court rejected the claim because Blasi asserted no factual basis for it: "Appellant's averments, however, are too general and, therefore, inadequate." *Commonwealth v. Blasi*, No. 988 Philadelphia 1994, slip op. at 8 (Pa. Super. Ct. Apr. 28, 1995). The basic point being made is that Blasi failed to point to specific moments at which counsel should have objected because "counsel will not be found ineffective in a vacuum." *Id.* (citations omitted).

Blasi appends to his objections to the report and recommendation a copy of his petition for allocatur during the direct appeal stage to support his objection. Of course, as was recited in our prior memorandum, the court was aware that such a petition had been filed due to a published table indicating that allocatur had been denied. *See* 30 F. Supp. 2d

at 483 (citing table at 666 A.2d 1050). However, a review of the issues presented in Blasi's petition for allocatur reveals that the claim of ineffective assistance of counsel for failure to object to instances of prosecutorial misconduct was *not* raised, and so the claim was not exhausted on direct appeal, at least insofar as a claim heretofore has been considered exhausted. As discussed at length below, that has changed.

Like the claim of ineffective assistance for failure to obtain a transcript of the preliminary hearing, the Court of Common Pleas found the claim relating to the failure to object to prosecutorial misconduct barred on PCRA review because it had been previously litigated. *Commonwealth v. Blasi*, No. 93 CR 96, slip op. at 10 (C.P. Lackawanna Cty. Mar. 20, 1997). The claim was not presented to the Superior Court on appeal from the denial of PCRA relief. Plainly, then, the issue was both previously litigated, 42 Pa. Cons. Stat. Ann. § 9544(a), and waived, § 9544(b), and therefore may not be the subject of further PCRA proceedings. 42 Pa. Cons. Stat. Ann. § 9543(a)(4). *See also Commonwealth v. Pursell*, 724 A.2d 293, 303 and n. 7 (Pa.) (former "relaxed waiver" rule in capital cases no longer applicable, so that Pennsylvania courts strictly adhere to statutory language of PCRA and will entertain waived claims only if statutory exceptions apply), *cert. denied*, 120 S.Ct. 422 (1999).

An unexhausted claim will not be considered by a federal court conducting habeas review, and a petition containing both exhausted and unexhausted claims, a "mixed petition," must be dismissed so that the petitioner may present the unexhausted claims to the state courts. *Rose v. Lundy*, 455 U.S. 509 (1982). However, the petition is not a "mixed

petition" when the claim is procedurally barred under state law. *Toulson v. Beyer*, 987 F.2d 984, 987 (3d Cir. 1993). The reason is that exhaustion is not possible when the state court would find the claim procedurally defaulted. *Id.* (citing, *inter alia*, *Coleman v. Thompson*, 111 S.Ct. 2546, 2555 and n. 1 (1991)). The federal court will review only those claims that have been exhausted, and will not consider any claim which is procedurally barred. *Id.*

A claim will be procedurally barred for purposes of habeas review only when state law clearly forecloses state court review of the claim, *id.*, requiring that the rule embodying the procedural bar be consistently or regularly applied. *Banks v. Horn*, 126 F.3d 206, 211 (3d Cir. 1997). Technically, such a claim is exhausted because state court review is no longer available, but the state procedural bar provides an independent and adequate ground for the judgment under state law which forecloses federal habeas review. *Gray v. Netherland*, 518 U.S. 152, 161-162 (1996).

Given the holding by the Supreme Court of Pennsylvania that, even in capital cases, the language of the PCRA must be applied strictly and there no longer is any "relaxed waiver" standard, we have no trouble concluding that the same strict construction rule would apply in non-capital cases such as Blasi's, and collateral review of the claim of ineffective assistance for failure to object to prosecutorial misconduct is "clearly foreclosed" under state law. This conclusion is buttressed by the holding of the Court of Common Pleas that the claim was barred as previously litigated.

Appendix B

There has been, however, an interesting development in the law of exhaustion as it applies to petitions for allocatur in the Supreme Court of Pennsylvania. On May 9, 2000, the Court issued an order stating that a petition for allocatur is not necessary for exhaustion prior to commencing habeas proceedings. The order reads:

> **AND NOW**, this 9th day of may, 2000, we hereby recognize that the Superior Court of Pennsylvania reviews criminal as well as civil appeals. Further, review of a final order of the Superior Court is not a matter of right, but of sound judicial discretion, and an appeal to this Court will only be allowed when there are special and important reasons therefor. Pa.R.A.P. 1114. Further, we hereby recognize that criminal and post-conviction relief litigants have petitioned and do routinely petition this Court for allowance of appeal upon the Superior Court's denial of relief in order to exhaust all available state remedies for purposes of federal habeas corpus relief.
>
> In recognition of the above, we hereby declare that in all appeals from criminal convictions or post-conviction relief matters, a litigant shall not be required to petition for rehearing or allowance of appeal following an adverse decision by the Superior Court in order to be deemed to have exhausted all available state remedies respecting a claim of error. When a claim has been presented to the Superior Court, or to the Supreme Court of Pennsylvania, and relief has been denied in a

> final order, the litigant shall be deemed to have exhausted all available state remedies for purposes of federal habeas corpus relief.
>
> This Order shall be effective immediately.

In re: Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases, No. 218 Judicial Administration Docket No. 1 (Pa. May 9, 2000) (*per curiam*).[4] *See also* William P. Murphy, *State High Court Signals Sea Change in Federal Habeas*, PENNA. LAW WEEKLY, May 29, 2000, at 12.

Of course, it may be argued that failing to petition at all is different from omitting a claim from a petition for allocatur, as Blasi did in this case. However, the last sentence of the second paragraph of the order is very general, stating that a final order denying any claim which has been reviewed by the Superior Court is sufficient for exhaustion. We therefore conclude that the order governs Blasi's claim on direct appeal. The next issue is whether the May 9, 2000, order governs our review for exhaustion purposes.

At first blush, it would seem odd that a state court might dictate to a federal court the interpretation of a federal statute. After all, the statute provides that a writ may not issue unless "the applicant has exhausted the remedies available in the courts of the State . . ." 28 U.S.C. § 2254(b)(1)(A). The subsection governing exhaustion formerly, i.e. before AEDPA, provided that a claim was not exhausted while the

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4. The May 9, 2000, order has been published in the Pennsylvania Reporter version of the Atlantic Reporter Second Series, vol. 749-750 at CXIV.

petitioner "has the right under the law of the State to raise, by any available procedure, the question presented." 28 U.S.C. former § 2254(c). *See also Castille v. Peoples*, 489 U.S. 346, 350 (1989) (quoting same provision in holding that presentation of claim for first time in petition for allocatur to Supreme Court of Pennsylvania is not "fair presentation" of claim). This provision was preserved in AEDPA. *See* current § 2254(c). However, the exhaustion doctrine is not a jurisdictional prerequisite, but a rule of comity. *Castille* at 349. The exhaustion doctrine creates a strong presumption in favor of requiring a petitioner to pursue available state remedies, *id.*, though the presumption is not conclusive. *See Rose* at 515 (exhaustion required "except in unusual circumstances").

In *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999), the Supreme Court held that discretionary review by a state's highest court is an available procedure, so that the failure to present the claim in a petition for discretionary review was a failure to exhaust the claim.

Much of the discussion in *O'Sullivan* related to the administrative burden the holding would place on the high courts of the states when prisoners would recite a laundry list of claims in a petition for discretionary review, not because the claims were of such merit and the issues were of such importance that they expected the petition to be granted, but because they wanted to preserve the issues for federal habeas review. *Id.* at 847 (majority opinion by O'Connor, J.), at 849-850 (Souter, J., concurring), at 861-862 (Stevens, J., dissenting), at 862-864 (Breyer, J., dissenting). In the majority opinion, Justice O'Connor pointed out that a state

simply could make discretionary review "unavailable," *id.* at 847-848, at least so that it would be the equivalent of an exceptional remedy and not part of the ordinary appellate process, to avoid the administrative burden.

In making this point, Justice O'Connor cited *In re Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases*, 321 S.C. 563, 471 S.E.2d 454 (1990); *State v. Sandon*, 161 Ariz. 157, 777 P.2d 220 (1989) (*in banc, per curiam*). The Court did not hold that an order of a state's highest court that a petition for discretionary review is unnecessary for exhaustion would suffice as a waiver, and to the extent this discussion may be read as suggesting that such an order would limit the need to exhaust to the state's intermediate appellate court, it properly may be read as *obiter dicta.* That is, the state from which the case arose, Illinois, did not have a rule or order from its high court to the effect that it did not want petitions for discretionary review filed solely for comity purposes, and the principles underlying *In re Exhaustion* and *Sandon* do not govern the outcome.

However, given the Supreme Court's paramount position in our three-tier system and its limited docket, we are required to give its dictum great deference; the Court uses dictum to provide guidance to lower courts and to control and influence issues it cannot decide. *In re McDonald*, 205 F.3d 606, 612-613 (3d Cir. 2000); *Alston v. Redman*, 34 F.3d 1237, 1247 (3d Cir. 1994), *cert. denied*, 513 U.S. 1160 (1995); *Town Sound and Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 495-496 n. 41 (3d Cir.), *cert. denied*, 506 U.S. 868 (1992). In this case, the Supreme Court in *O'Sullivan* left

open the possibility that an order of the state's high court could satisfy comity and effectively waive the exhaustion requirement, as emphasized in the concurring and dissenting opinions. *Id.* at 849-850 (Souter, J., concurring); at 861-862, 864 (Stevens, J., and Breyer, J., dissenting). The majority's citation to two instances in which state courts had done so is strongly suggestive that this means of waiving the exhaustion requirement would be upheld by the Supreme Court of the United States, and those Justices who concurred and dissented in *O'Sullivan* would so hold. In these circumstances, we believe that we are bound to hold, and we do hold, that the order of the Supreme Court of Pennsylvania waives the exhaustion doctrine insofar as the doctrine requires a petitioner under § 2254 to present claims to the Supreme Court of Pennsylvania in a petition for allocatur prior to presenting them in federal court.

In reaching this conclusion, we must express great reservation about this holding, both as a matter of reading *O'Sullivan* and as a matter of policy. To place our concerns into context, we begin with a short discussion of the development of the questioned principle.

Ironically, the evolution begins with a decision by the Supreme Court of Arizona which had nothing to do with exhaustion as the term is used in federal habeas corpus jurisprudence. In *State v. Shattuck*, 140 Ariz. 582, 684 P.2d 154 (1984) (*in banc*), the defendant pled guilty to charges relating to sexual conduct with minors but wanted to challenge the sentence. Counsel for the defendant filed an appeal and brief pursuant to *Anders v. California*, 386 U.S. 738 (1967). The Court of Appeals (the intermediate appellate court in Arizona) affirmed after reviewing the merits of the issue raised and reviewing the

record for error. The defendant then demanded that counsel file a petition for review by the state Supreme Court. Counsel submitted a petition for review of the length of the sentence, and added an issue of counsel's duties relating to a petition for review when counsel does not believe a petition is required. *Id.* at 583-584, 684 P.2d at 155-156.

The Supreme Court of Arizona concluded that counsel did not have the responsibility to file a petition for review by that Court because the defendant's only appeal as of right was to the Court of Appeals. In reaching this conclusion, it stated, "In cases other than those carrying a life sentence or the death penalty, a decision by the court of appeals and its search for error exhausts a defendant's right of appeal in this jurisdiction." *Id.* at 585, 684 P.2d at 157.

In *Sandon*, the Supreme Court of Arizona expanded the holding of *Shattuck* to apply to the availability of a remedy. The defendant was one of several inmates who were convicted of conspiracy to introduce firearms into a state prison or the substantive offense. The Court of Appeals reviewed 13 issues on appeal, 12 of which applied to Sandon. After the conviction was affirmed, counsel for Sandon filed a petition for review with the state Supreme Court which raised three issues. The petition for review was denied. *Sandon* at 157, 777 P.2d at 220.

Sandon next filed a petition under § 2254 in federal district court, which dismissed the petition without prejudice because Sandon had not exhausted his state remedies because eight of the issues raised in his § 2254 petition had not been presented in the petition for review by the Arizona Supreme Court. Sandon

then filed a second petition with the state Supreme Court. That Court first noted that the right to an appeal is limited to the appeal to the Court of Appeals. It relied on *Shattuck* for the proposition that when the defendant has been given the first appeal as of right, state remedies have been exhausted. It therefore dismissed the second petition. *Sandon* at 158, 777 P.2d at 221.

One other important aspect of *Sandon* is that the Supreme Court of Arizona indicated that it would have disposed of the second petition for review with a summary order rather than in an opinion but for the fact that "the Court continues to receive large numbers of prisoner petitions seeking to exhaust state remedies . . ." *Id.* at 157, 777 P.2d at 220.

The rather glaring problem with *Sandon*, of course, is that it directly contradicts *O'Sullivan*. The petitioner in federal habeas corpus proceedings had failed to include his federal claims in a petition for discretionary review by the state's high court and the § 2254 petition was dismissed. The Supreme Court of Arizona held that the state remedies had been exhausted because the petitioner did not have the right to review in that court, while the Supreme Court of the United States held that such review is an available remedy as a normal part of the appellate process. *Compare O'Sullivan* at 843 (quoting Ill. Sup.Ct. R. 315(a) for factors to be considered by Supreme Court of Illinois in deciding whether to grant discretionary review) *with* Ariz. R. Crim. P. 31.19.c.3 (setting forth similar factors to be considered by Supreme Court of Arizona in deciding whether to grant discretionary review). Remarkably, not one Justice noted that the holding of *O'Sullivan* was directly contrary to that of *Sandon*.

Regardless, the next court to take action to deem presentation of a claim to a state intermediate appellate court as exhaustion for purposes of federal habeas review was the Supreme Court of South Carolina, which issued the following order:

In 1979, the General Assembly created the South Carolina Court of Appeals for the purpose of reducing South Carolina's appellate backlog. The Court of Appeals reviews criminal as well as civil appeals, and this Court reviews its decisions by writ of certiorari only where special reasons justify the exercise of that power.

> We recognize that criminal and post-conviction relief litigants have routinely petitioned this Court for writ of certiorari upon the Court of Appeals' denial of relief in order to exhaust all available state remedies.[1] We therefore declare that in all appeals from criminal convictions or post conviction relief matters, a litigant shall not be required to petition for rehearing and certiorari following an adverse decision of the Court of Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, when the claim has been presented to the Court of Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies. This order shall become effective immediately.

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[1] *See* 28 U.S.C.A. § 2254(b)-2254(c)(1977).

Re Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases, 321 S.C. 563, 471 S.E.2d 454 (1990).

Appendix B

In substance, the order of the Supreme Court of South Carolina is virtually identical to that of the Supreme Court of Pennsylvania, and contains the same questionable aspects. The order, on its face, is an attempt by a state court to determine an area of federal law which is the exclusive province of the federal courts. That is, the Supreme Court established the exhaustion doctrine as a prerequisite to federal habeas review, and the doctrine was codified by Congress. The question is whether a particular form of, or avenue for, relief under state law is "available" to a person challenging a conviction under state law. The states define the form of relief and outline the procedure for obtaining relief, and federal courts determine whether that relief is "available" for purposes of habeas corpus relief and the exhaustion doctrine.

This view is consistent with the language actually employed by the Supreme Court of the United States in *O'Sullivan*. After noting that some state courts may not wish the increased burden imposed by the requirement of exhaustion, the Court continued:

> Under these circumstances, Boerckel may be correct that the increased, unwelcome burden on the state supreme courts disserves the comity interests underlying the exhaustion doctrine. In this regard, we note that nothing in our decision today requires the exhaustion of any specific state remedy when a State has provided that that remedy is unavailable. Section 2254(c), in fact, directs federal courts to consider whether a habeas petitioner has "the right *under the law of the State*

> *to raise, by any available procedure*, the question presented" (emphasis added). The exhaustion doctrine, in other words, turns on an inquiry into what procedures are "available" under state law. In sum, there is nothing in the exhaustion doctrine requiring federal courts to ignore a state law or rule providing that a given procedure is not available. We hold today only that the creation of a discretionary review system does not, without more, make review in the Illinois Supreme Court unavailable.

O'Sullivan at 847-848.

In this case, since our inquiry depends on whether discretionary review is an "available" procedure under Pennsylvania law, we believe that our answer must be "yes," because allocatur is analogous to the discretionary review which the Supreme Court found to be "available" under Illinois law. The order issued by the Supreme Court of Pennsylvania does not make allocatur unavailable, since the actual procedure, scope of review, etc., has not changed.

The difficulty as we perceive it is that the orders issued by both the Supreme Court of Pennsylvania and the Supreme Court of South Carolina appear to conflate making a remedy unavailable with waiving the requirement of exhaustion with respect to an available remedy. The basic idea is that the remedy is available but the petitioner need not avail himself or herself of the remedy, as far as the Supreme Court of Pennsylvania is concerned. "Thanks for the comity, federal courts, but no thanks." That this confusion exists is reflected

in the language used in the orders we have quoted to the effect that the petitioner need not apply for discretionary review to have been "deemed" to have exhausted state remedies. The crux of the matter is that it is the federal courts which do the "deeming," not the state courts.

What the orders really mean, then, is that the state courts want to waive the exhaustion requirement. Not surprisingly, that action gives rise to further difficulties. Section 2254(b)(3) provides that "[a] State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement." That provision appears to indicate that we may not "deem" the requirement waived by an order of the state's high court, nor does the high court's order estop the Commonwealth from relying on the exhaustion requirement. Rather, for each and every petition filed under § 2254, counsel for the Commonwealth (whether it is the Office of the Attorney General or the local District Attorney's Office) would have to waive the requirement expressly.

Another way to view this problem is by questioning whether a state's high court has the authority to waive the exhaustion requirement. While it is the courts of a state that are faced with the burden of extra (or at least more comprehensive) applications for discretionary review, and it is for the benefit of the state courts that the principle of comity usually applies, it is the executive that litigates those cases on behalf of the people of the state, and it may be that the executive does not wish to forgo a round of litigation, especially if that litigation might further narrow the issues for habeas review.

Appendix B

Given that we hold that we are bound by *O'Sullivan*, and given the depth of analysis which would be necessary, we will not attempt to delineate the roles and authority of the Supreme Court of Pennsylvania[5] and the Office of the Attorney General,[6] as compared to, for example, the Governor or the Pennsylvania Legislature, to take an action such as waiving the exhaustion requirement. *But see Lavia v. Commonwealth of Pennsylvania*, No. 99-3863, slip op. at 6 (3d Cir. Aug. 8, 2000) (under Pennsylvania Constitution, Pa. Const. Art. 1, § 11, legislature has authority to decide what types of cases may be brought against the Commonwealth, and in what courts). In this context, we note only that it is perhaps better that § 2254 is clear in providing a manner for the states to waive exhaustion.

Given the foregoing and our expressed reticence concerning the propriety of the May 9, 2000, order by the Supreme Court of Pennsylvania, one might reasonably question why our holding is to the contrary. This question is answered, to some degree, in *Swoopes v. Sublett*, 196 F.3d 1008 (9th Cir. 1999) (*per curiam*), *cert. denied*, 120 S. Ct. 1996 (2000). That case was remanded by the Supreme Court for further consideration in light of its decision in *O'Sullivan*. Succinctly stated, the Ninth Circuit, on remand, determined that Arizona made a clear statement in *Sandon* that

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5. Which, by way of example, includes the authority to exercise the powers of justices of the Court of King's Bench, Common Pleas, and Exchequer, at Westminster as of May 22, 1722. 42 Pa. Cons. Stat. Ann. § 502.

6. *See generally* Commonwealth Attorneys Act, 71 Pa. Stat. Ann. § 732-101 et seq.

discretionary review was not part of the "one complete round of the State's established appellate review process." *Swoopes* at 1010 (quoting *O'Sullivan* at 845).[7] The Ninth Circuit's opinion also embodies the principle we have stated concerning deference to Supreme Court dicta. We think that the opinion in *Swoopes* captures the essence of our hesitancy to close the door left open by the Supreme Court dicta in *O'Sullivan*, and we conclude that the order of the Supreme Court of Pennsylvania removes a petition for allocatur from the one complete round of Pennsylvania's established appellate review process.

Based on the foregoing, we turn to the merits of Blasi's claim. We note, however, that it is not clear that Blasi has demonstrated exhaustion of the claim as it is being presented to this court. As discussed above, Blasi failed to provide a factual basis for the claim of ineffective assistance on direct appeal to the Superior Court. In fact, the claim appears to have been simply that counsel failed to make objections, without even specifying the nature of the objections which should have been made. *Commonwealth v. Blasi*, No. 988 Philadelphia 1994, slip op. at 8 (Pa. Super. Ct. Apr. 28, 1995). *See also* Blasi's Petition for Allowance of Appeal before Supreme Court of Pennsylvania at 3 (stating question as whether trial counsel was ineffective "for failing to make or preserve appropriate objections"). For example, the claim of ineffective assistance for failing to make objections as it was presented to the PCRA court did not allege that the

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7. Another way of expressing this concept is to say that the state courts have expressed a desire that their discretionary review procedure be thought of as an extraordinary writ rather than as part of the ordinary appellate review process.

prosecutor knowingly used perjured testimony, though four other instances of questionable conduct were alleged. Blasi's Brief in Support of PCRA Petition at 7. No issue relating to alleged prosecutorial misconduct was presented to the Superior Court on appeal from the denial of PCRA relief. Brief of Appellant (on appeal of order denying PCRA petition) at 4.

We will presume for present purposes, however, that the general statement of the issue deemed insufficient for consideration by the Superior Court on direct review is sufficient for purposes of exhaustion. Presentation of the issue to the Superior Court would be sufficient exhaustion to permit this court to consider the claim for the reasons discussed above. We presume the issue exhausted, but need not decide the issue finally due to our authority under § 2254(b)(2). We turn first to the contention that counsel was ineffective for failing to object to prosecutorial misconduct in the form of knowing use of perjured testimony.

In Pennsylvania, a person is guilty of perjury when he or she makes a false statement under oath in an official proceeding, the statement is material, and the speaker does not believe it to be true. 18 Pa. Cons. Stat. Ann. § 4902(a). The element of subjective belief is especially difficult to prove, requiring circumstantial evidence to establish. *Commonwealth v. Atwood*, 601 A.2d 277, 287 (Pa. Super. Ct. 1991), *allocatur denied*, 607 A.2d 249 (1992) (table). If a statement offered as evidence is vague, it will not support a finding of a subjective belief in its falsity. *See Atwood* at 287-288 (statement by donor that she did not mind if money was not repaid as long as donee "continued to do the Lord's

work" reasonably relied on by donee in testifying that money was a gift and not a loan, but statements by others that money they provided was a loan and not a gift were not vague and supported conviction of recipient of funds who swore that money was a gift). When the allegedly false statement is contradicted by clear evidence to the contrary of which the speaker was aware, that evidence will be sufficient to establish subjective belief in the falsity of the statement. *See Commonwealth v. Marchand*, 682 A.2d 841, 842-843 (Pa. Super. Ct. 1996) (evidence that defendant directed that jackets be given to others sufficient to support conviction for perjury relating to false statement in affidavit that jackets were stolen), *allocatur denied*, 692 A.2d 564 (1997)(table).

The testimony to which Blasi refers was that of Joanne Kester Blasi. On direct examination, she testified that she noticed changes in Michael's behavior in the spring of 1992. N.T. 1/12/94 at 104. She went on to explain that these changes included becoming defiant about "checking in" at home, especially with Blasi. *Id.* at 104-105. Also, Michael's grades started to drop, he failed gym class because he would not bring his gym clothes to school, *id.* at 105, he would go to David's bed (or vice versa) at night, *id.* at 105-106, and he would have bowel movements in the bathtub. *Id.* at 106.

On cross examination, Joanne denied any "behavioral problems" with Michael before Blasi moved in with her. *Id.* at 108. She denied having Michael examined at Scranton Counseling Center for behavioral problems in kindergarten, *id.*, later explaining that Michael was only three in 1982 and therefore not even *in* kindergarten in 1982. *Id.* at 110-111. She admitted sending Michael to an evening program at the

Friendship House, but denied that this was due to behavioral problems. *Id.* at 108. Rather, she saw that the program offered structure when David was involved, so she sent Michael. *Id.* at 109. Any evaluation of Michael at Scranton Counseling Center prior to 1986 was due to a hearing problem and delays resulting from a premature birth. *Id.*

Presumably in an attempt to show that this testimony was untrue, defense counsel asked if any records showing that Joanne was taking Michael to Scranton Counseling Center in 1982 for impulsive and aggressive behavior, a short attention span, and poor academic performance would be false. Joanne answered that such records would be false because Michael was not in school in 1982. *Id.* at 110-111. Joanne next denied sending Michael to the Friendship House summer diagnostic program for defiant and fire starting behaviors, *id.* at 111-112, or to the Friendship House in 1990 for an evaluation because of behavior problems. *Id.* at 112.

At that point in the cross examination, the prosecutor objected to the reference by defense counsel to documents not in the record, and a discussion was held at sidebar. It turned out that defense counsel had subpoenaed records from Friendship House and Scranton Counseling Center which, under Pennsylvania law, were the subject of a privilege. The trial court therefore excluded the records and barred questioning thereon. *Id.* at 112-116. Defense counsel did, however, ask one more question about "behavioral problems" prior to 1992, which Joanne denied. *Id.* at 116.

According to Blasi, at some point during this cross examination, the prosecutor must have become aware that

Joanne was perjuring herself but did nothing to stop it. Instead, the prosecutor objected to the cross examination and asserted the privilege, thereby preventing impeachment of the perjurious testimony.

We do not see how the testimony to which Blasi refers may be considered perjury because the evidence is not clear that Joanne subjectively knew that her statements were untrue. Nothing in this recitation shows that Joanne knew what was in the records, or that she even knew that the records existed. The statements in the records were not hers, as far as can be ascertained from this record, but those of psychologists. At most, the testimony may be said to reflect a mother who did not recognize behavioral problems as such, attributing behavioral difficulties instead to a premature birth, hearing difficulty, and a potential learning disability. None of this constitutes the clear evidence of subjective knowledge of, or belief in, the falsity of a statement necessary to sustain a conviction for perjury under Pennsylvania law.

Of course, if the testimony cannot be viewed as clearly perjured, the prosecutor cannot be said to have knowingly used perjured testimony based on this evidence, and defense counsel would have no reason to object to alleged prosecutorial misconduct for the use of perjured testimony. Moreover, due to the privilege, there would be no way for counsel (either defense counsel in the proceedings in which the perjury occurred or the Commonwealth in a later prosecution) to prove any alleged perjury. Counsel cannot be ineffective for failing to raise a futile objection. *United States v. Merlino*, 2 F. Supp.2d 647, 668 (E.D. Pa. 1997). Blasi's claim in this respect therefore fails for the simple

reason that the challenged testimony would not support a charge of perjury by Joanne Blasi.

Blasi next contends that the prosecutor improperly coached witnesses, but points to only two specific instances of such purported conduct. The supposed coaching actually constituted a review of Michael's testimony, N.T. 1/12/94 at 51, and included a statement by Michael that he was to provide correct answers. *Id.* The second instance is an interview of Michael in the District Attorney's Office. *Id.* at 75-76. In neither instance did Michael say that he was told what to say. In fact, he later testified that no one ever told him what to say and that he was told only to tell his story and to tell the truth. *Id.* at 78-79. We find no improper coaching of witnesses.

Blasi contends that references by the prosecutor to the unimpeached testimony of Michael and Joanne constitutes misconduct. Since the testimony was admitted, there can be no misconduct in referring to it. Moreover, the Superior Court affirmed the trial court's ruling with respect to admission of the psychological records and cross examination thereon. *Commonwealth v. Blasi*, No. 988 Philadelphia 1994, slip op. at 5 (Pa. Super. Ct. Apr. 28, 1995). Objection to the prosecutor's references to the testimony would have been futile, and counsel was not ineffective for failing to object.

Blasi next argues that the prosecutor committed misconduct by making loud remarks at sidebar. The first related to the applicability of a hearsay exception when a counselor testified that Michael had said he was afraid of AIDS after he and Blasi engage in anal intercourse.

The prosecutor, at the time of the loud voice, was indicating that the "tender years exception" under 42 Pa. Cons. Stat. Ann. § 5985.1 was inapplicable. Rather, the statement was admissible under an exception to the hearsay rule for statements made to a medical provider. The trial court agreed with the prosecutor and overruled the objection. N.T. 1/13/94 at 17-21. We fail to see any prejudice, much less unfair prejudice, to a defendant in a jury possibly overhearing part of a discussion regarding hearsay exceptions.

The only other instance of the prosecutor's using a loud voice to which Blasi refers is a proffer at sidebar concerning the testimony of Reverend Vernon Searfoss concerning counseling sessions with Joanne and Blasi. *Id.* at 37. This proffer was consistent with the testimony which was presented, and we see no prejudice to Blasi even if the jury overheard the prosecutor's remarks.

The last argument raised by Blasi in this respect is that the prosecutor asked a number of leading questions or asked questions after objections were sustained, demonstrating a lack of regard for the rules of court which amounted to unfair manipulation of the proceedings. We first note that Pennsylvania permits "direct, succinct, and even leading questions" when the witness is a child because children are easily intimidated by a courtroom. *Commonwealth v. Polston*, 616 A.2d 669, 678 (Pa. Super. Ct. 1992), *allocatur denied*, 626 A.2d 1157 (Pa. 1993) (table). Moreover, when the testimony was of substantial importance, as opposed to background or transition questions, defense counsel in fact did object. *See, e.g.*, N.T. 1/12/94 at 42 (objection to question

about oral sex when prosecutor "put words in the witness' mouth"); at 49 (objection to question containing description of Michael's feelings about testifying). Regardless, we have read the entirety of the transcripts and find no "unfair manipulation of the proceedings" by the prosecutor.

In short, we have examined each of the allegations of alleged prosecutorial misconduct and find no such misconduct. Defense counsel cannot have been ineffective for failing to object to a non-occurring event, and Blasi's second claim fails.

VII. APPROPRIATE OBJECTIONS

Blasi contends that counsel was ineffective for failing to make and preserve appropriate objections. The Superior Court was referring specifically to this claim with its description of "too general and, therefore, inadequate." *Commonwealth v. Blasi*, No. 988 Philadelphia 1994, slip op. at 8 (Pa. Super. Ct. Apr. 28, 1995).

There are instances in which denial of the right to the effective assistance of counsel is of such magnitude that prejudice arising therefrom is presumed. *United States v. Cronic*, 466 U.S. 648, 658-659 (1984). Such circumstances would include the complete denial of counsel during a critical stage of a criminal trial or the denial of the right of effective cross examination. *Id.* at 659. "Apart from circumstances of that magnitude, however, there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt." *Id.* at 659 n. 26 (citing,

inter alia, Strickland at 693-696). A court reviewing a claim of ineffective assistance looks to the actual performance of counsel at trial to determine whether there are specific errors to support the claim. *Flamer v. Delaware*, 68 F.3d 710, 729 (3d Cir. 1995), *cert. denied*, 516 U.S. 1088 (1996).

In this case, it cannot be said that counsel was not provided nor that cross examination was not permitted, and there are no other circumstances of such constitutional magnitude as to give rise to a presumption of prejudice from a denial of the assistance of counsel. We therefore look for specific errors of counsel to determine whether there was ineffective assistance which undermined the reliability of the guilty verdict.

The only specific instance to which Blasi points as a failure to raise an objection is opinion testimony by Joanne. N.T. 1/12/94 at 97. Actually, counsel had objected to opinion testimony during a sidebar conference after the prosecutor put a proffer on the record. *Id.* at 91-93. Moreover, there does not appear to be what normally is denominated opinion testimony by Joanne during the testimony cited by Blasi. Rather, the testimony relates to the reasons for Blasi leaving the marital residence in July, 1992. Joanne went to a counselor for behavioral problems with David (the older son), told him that she was considering "going residential," *id.* at 97, and asked if CYS would be of help. The counselor agreed and an appointment was made. Later, Joanne took David to CYS and a file was opened, with further investigation to follow. On learning that Joanne had gone to CYS and that there was to be an investigation, Blasi became angry and upset, and left the house. *Id.* at 97-98. All of this is simply a factual recitation of the circumstances surrounding Blasi's departure.

In contrast, during testimony by Joanne relating to changes in Michael's behavior, counsel renewed the objection made at sidebar to opinion evidence. *Id.* at 104.

In other words, when there was testimony which could be characterized as improper opinion testimony, counsel objected; there was no objection when the testimony was not an opinion. We find no error by counsel in this respect.

While we do not believe it necessary due to the general nature of the argument, we note that we disagree with Blasi's characterization of trial counsel's performance when he says, "Throughout the course of the proceedings, however, trial counsel made virtually no objections and consistently failed to set forth sufficient grounds for objections in order to preserve issues for appellate review." Blasi's Brief in Support of Amended Habeas Corpus Petition at 10. Any trial attorney knows that raising every minor objection risks irritating a jury and appearing obstructionist or argumentative. Objections therefore are reserved for questions of importance as to which there is a meritorious objection. Trial counsel not only did this, but consistently raised objections of merit at sidebar if possible, thereby avoiding argument before the jury.

We find no ineffective assistance by counsel for failing to raise objections or preserve issues for appellate review.

VIII. POST TRIAL MOTIONS

Blasi argues that trial counsel was ineffective for failing to file post trial motions. He contends that a post trial motion was necessary to preserve the issue of prosecutorial misconduct for appellate review.

Appendix B

We already have noted that the claim of prosecutorial misconduct lacks a factual basis. In addition, as the Superior Court noted in its opinion on direct appeal, post trial motions have been replaced in Pennsylvania with post-sentence motions. *See* Pa. R.Crim. P. 1410.B. Since such motions are optional, Blasi cannot have been prejudiced by any failure to file a motion. *Commonwealth v. Blasi*, No. 988 Philadelphia 1994, slip op. at 6 (Pa. Super. Ct. Apr. 28, 1995).

IX. PRETRIAL PREPARATION AND INVESTIGATION

Blasi's claim that trial counsel failed to conduct adequate pretrial preparation and investigation relates to the testimony of William Grochowski, Bob Okrak, Charles LeStrange, and Kathy Stankiewicz. *Commonwealth v. Blasi*, No. 1512 Philadelphia 1997, slip op. at 4 (Pa. Super. Ct. Jan. 30, 1998). Blasi argued before the PCRA court and the Superior Court on appeal from the denial of relief under the PCRA that the testimony of these witnesses, as well as records in their possession, would have: (1) established an alibi defense; (2) demonstrated that Blasi was physically incapable of committing the crime; and (3) impeached the primary prosecution witnesses.

As noted in the previous section of this memorandum, a claim of ineffective assistance of counsel generally applies to actual errors by counsel during trial. However, the *Strickland* test also applies to a claim of ineffective assistance for failure to conduct a pretrial investigation, including interviews of potential witnesses, and to call witnesses at trial. *See generally Coss v. Lackawanna County D.A.*,

204 F.3d 453, 462 (3d Cir. 2000). The performance of counsel still must be objectively unreasonable, and not a matter of "justifiable or strategic decisions," *id.* at 462 n. 9, and prejudice is demonstrated by showing that a reasonable probability exists that, if counsel had subpoenaed the witnesses, the defendant would not have been found guilty. *Id.* at 462.

Logically, counsel cannot be ineffective for failing to call a witness whose identity was unknown and could not have been known, or who was unavailable at the time of trial. Also, the defense cannot have been prejudiced unless the potential witness had favorable evidence to provide. The Supreme Court of Pennsylvania therefore has summarized the elements of such a claim as follows:

> To prove that counsel was ineffective for failing to call a witness, Appellant must show that: (1) the witness existed; (2) the witness was available to testify for the defense; (3) counsel knew or should have known of the existence of the witness; (4) the witness was willing to testify for the defense; and (5) the absence of the witness was so prejudicial as to have denied Appellant a fair trial.

Commonwealth v. Holloway, 739 A.2d 1039, 1048 (Pa. 1999).

The magistrate judge first echoed the holding of the PCRA court and Superior Court with respect to these witnesses and their relation to an alibi defense. That is, both the Superior Court and the PCRA court found that "an alibi

defense would have been ineffectual in this matter because the dates of the abuse are unknown." *Commonwealth v. Blasi*, No. 1512 Philadelphia 1997, slip op. at 6 (Pa. Super. Ct. Jan. 30, 1998) (quoting PCRA court opinion). Blasi does not object to the report and recommendation in this regard, and we agree with the magistrate judge and the state courts in any event.

Instead, Blasi objects to the failure of the magistrate judge to address the other reasons for which this evidence should have been presented, according to Blasi. The first is his physical inability to perform the conduct about which Michael testified. The Superior Court quoted at length from the opinion of the PCRA court opinion on this issue, concluding that the jury was aware from the testimony of Blasi and Michael concerning the injury. *Id.* at 7 (quoting PCRA court opinion at 9-10). In fact, Michael testified that Blasi sometimes wore a sling. *Id.* We also note that Joanne testified concerning Blasi's injuries. N.T. 1/12/94 at 95-96, 120.

Because the jury already had this information, the state courts found that any further medical testimony would have been unnecessarily repetitious. This conclusion is neither contrary to any decision of the Supreme Court of the United States, nor an unreasonable application of any decision of the Supreme Court. We must agree that counsel was not ineffective for failing to call any witness for the purpose of providing further evidence of Blasi's physical condition.

In his brief, Blasi states:

> Furthermore, Blasi argued that there was evidence of extensive physical abuse of Michael

> Kester and his brother by their mother, and that Michael Kester had an extensive criminal record and a history of aggressive, manipulative, and vindictive behavior. Pretrial and trial counsel never made any efforts whatsoever to investigate these issues. The Superior Court failed to even mention them in their January 30, 1998, Memorandum.

Blasi's Memorandum of Law in Support of Objections to Report and Recommendation at 12.

The problem with this aspect of Blasi's claim is that he made no such argument before the Superior Court. The evidence which Blasi contends should have been the subject of pretrial investigation is recited by his counsel in a brief supporting his appeal from the denial of PCRA relief. Brief of Appellant at 11-15. The matters discussed include Blasi's medical records, showing the dates of visits and physical therapy, his health care providers and medications, and details of his condition with respect to the range of motion in his left shoulder. *Id.* at 12. Also, witnesses testified concerning Blasi's work records, *id.* at 13, Joanne's work records, *id.* at 13-14, Blasi's physical therapy sessions, *id.* at 14, purported threats by Joanne Blasi, *id.* at 14-15, Blasi's physical condition as viewed by lay witnesses, *id.* at 15, the availability of the above-described records, *id.*, and Blasi's general daily routine. *Id.* Blasi's argument concerning the failure to investigate or call witnesses, *id.* at 18-23, relates to using these witnesses and records to corroborate his own testimony and to impeach Joanne and Michael, in addition to the alibi argument. There is no discussion of any physical abuse by Joanne, nor any mention of

Michael's criminal history[8] and record of aggressive, manipulative, and vindictive behavior. Given the lack of record evidence to support this contention as well as the fact that it was not raised before the state courts in the form now argued (*see* discussion above concerning failure to exhaust and procedural default), Blasi is not entitled to habeas relief based on this purported evidence.

Finally, Blasi argues that Francis Kester, Joanne's ex-husband, would have testified that Joanne, Michael, and David had threatened to bring similar charges against him in the past and that Joanne actually had taken steps to do so. The only reference to such a threat mentioned in the brief before the Superior Court is in the summary of the testimony of Rachael Mahnke in Blasi's trial with respect to charges of sexual conduct with David. Mahnke testified on cross examination that she informed Blasi's defense counsel in this case that Joanne had made a threat. Brief of Appellant at 14-15. No prospect of testimony by Francis Kester was argued before the state courts, and the testimony of Mahnke was not considered by the PCRA court because (1) Mahnke did not appear for the evidentiary hearing and (2) the testimony from the separate trial was not admissible or subject to judicial notice in the PCRA proceedings. *Commonwealth v. Blasi*, No. 93 CR 96, slip op. at 3-5 (C.P. Lackawanna Cty. Mar. 20, 1997).

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8. One wonders what sort of "extensive criminal record" a 12-or 13-year-old boy would have. Also, records generally are not available for offenses committed by children in Pennsylvania, *see* 42 Pa. Cons. Stat. Ann. §§ 6307, 6308, so that the source of this information must be questioned.

The claim as it relates to testimony by Francis Kester, then, is procedurally barred, and the claim as it relates to the testimony of Mahnke is unsupported by a factual basis. Blasi is not entitled to habeas relief on this final aspect of the claim.

X. JURY SELECTION PROCESS

Blasi's last claim is that pre-trial and trial counsel were ineffective for failing to object to the jury selection process in effect in Lackawanna County. Blasi argues that the process resulted in a jury which did not represent a fair cross-section of the community. *See generally Duren v. Missouri*, 439 U.S. 357 (1979).

The Superior Court held that this claim lacked merit because the jury selection process in Lackawanna County had been found constitutional in *Commonwealth v. Cameron*, 664 A.2d 1364 (Pa. Super. Ct. 1995), *allocatur denied*, 675 A.2d 1242 (Pa. 1996) (table), a decision which a later panel of the Superior Court could not overturn. *Commonwealth v. Taylor*, 649 A.2d 453, 455 (Pa. Super. Ct. 1994). Under *Commonwealth v. Parker*, 469 A.2d 582, 584 (Pa. 1983), because the underlying claim was without merit, counsel could not have been ineffective for failing to pursue the claim. *Commonwealth v. Blasi*, No. 1512 Philadelphia 1997, slip op. at 9 (Pa. Super. Ct. Jan. 30, 1998).

In *Cameron*, the defendant argued that Lackawanna County's use of driver's licenses excluded African-American, elderly, poor, and/or handicapped individuals. The Superior Court began by reciting the elements of a fair-cross-section claim: "1) the group allegedly excluded is a distinctive group

in the community; 2) representation of this group in the pool from which juries are selected is unfair and unreasonable in relation to the number of such persons in the community; and 3) the under-representation is due to systematic exclusion of the group in the jury selection process." *Cameron* at 1369 (citing *Duren*). The Superior Court then pointed out that the defendant failed to meet even the first element, since the group of persons who did not have driver's licenses was not distinctive, but would include people of all races, genders, and socio-economic classes, as well as both handicapped and non-handicapped individuals. *Id.* (citing *United States v. Grisham*, 841 F. Supp. 1138 (N.D. Ala. 1994), *aff'd*, 63 F.3d 1074 (11th Cir. 1995), *cert. denied*, 516 U.S. 1084 (1996)).

The Superior Court added that the defendant's equal protection argument failed as well because he did not show that he was a member of the class against whom discrimination was being directed and because he did not show *purposeful* discrimination. *Id. See also Duren* at 368 n. 26, 99 S.Ct. 664 (discussing differences between Sixth Amendment and Fourteenth Amendment analyses; *Ramseur v. Beyer*, 983 F.2d 1215, 1225-1226, 1234-1235 (3d Cir. 1992) (contrasting analysis under Sixth Amendment of *unfair* jury selection process with analysis under Fourteenth Amendment of *purposefully discriminatory* jury selection process), *cert. denied*, 508 U.S. 947 (1993). The Superior Court added, "in the interest of logic and practicality," that the use of the licensed driver list actually expanded the number of names available in the Lackawanna County jury pool. *Cameron* at 1369-1370.

Appendix B

Since *Cameron*, the Supreme Court of Pennsylvania has found a jury selection process involving the use of a list of registered drivers to be constitutional. *Commonwealth v. Lopez*, 739 A.2d 485, 495 (Pa. 1999), *cert. denied*, 120 S. Ct. 2203 (2000). It should be emphasized that, in pursuing a claim of ineffective assistance for failure to object to the jury selection process, the claimant also must demonstrate that there is evidence which would support such a claim. *Id.* at 495 n. 15.

Blasi states, "In this case, a timely motion and an evidentiary hearing establishing the *Duren* factors would have proven a violation of the fair cross-section requirement of the 6th Amendment." Blasi's Memorandum of Law in Support of Objections to Report and Recommendation at 16.

There is ample reason to conclude that trial counsel acted reasonably in determining that there was no basis for a motion challenging the jury selection process. Blasi points to no authority stating that the use of driver's license lists is *per se*, or even generally, an unconstitutionally exclusionary practice. While representatives of the Lackawanna County Court Administrator's Office apparently testified in *Commonwealth v. Young*, No. 397 of 1992 (C.P. Lackawanna Cty.), that the number of individuals selected for the jury pool actually decreased, Blasi's Memorandum of Law in Support of Objections to Report and Recommendation at 16-17, that testimony obviously did not lead to a change in the jury selection process (leading us to conclude that the trial court in *Young* did not find a constitutional violation despite this testimony), and the issue was not appealed. *Commonwealth v. Young*, 748 A.2d 166 (Pa. 1999).

Even at this stage, Blasi points to nothing which indicates that any distinct group is systematically excluded from participating on juries in Lackawanna County due to the use of driver's license lists.

Finally, Blasi contends that conditioning an individual's right to serve on a jury by the privilege of a driver's license violates *Duren*. We note first that this argument was not presented to the state courts, the claim being limited to the fair-cross-section argument discussed above. Also, the principle on which Blasi relies is not recited in *Duren*, despite his citation thereto. Regardless, absent a showing that distinct groups have been hindered in attempts to obtain driver's licenses, neither the Sixth Amendment nor the Fourteenth Amendment is violated by Lackawanna County's use of a list of licensed drivers. *Cf. United States v. Miller*, 116 F.3d 641, 659 (2d Cir. 1997) (absent showing that minority group was hindered in attempts to register to vote, use of voter registration list to draw jury venire constitutional), *cert. denied*, 524 U.S. 905 (1998), *abrogated in non-material part by Rutledge v. United States*, 517 U.S. 292 (1996). Since the use of a driver's license list to draw the jury venire does not violate the Constitution, counsel cannot have been ineffective for failing to so argue.

XI. FACTUAL DETERMINATIONS

Blasi raises objections concerning the magistrate judge's purported failure to consider the "second prong" of the analysis under § 2254(d), i.e. that the state court proceedings "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented

in the State court proceedings." Sec. 2254(d)(2). However, in expanding on these objections, his dispute is not with the factual findings but with the legal conclusions drawn therefrom, so that the analysis properly belongs under the first prong embodied in § 2254(d)(1). We find no unreasonable factual finding by the state courts based on the evidence presented.

XII. CONCLUSION

While not all of Blasi's claims were fairly presented to the Supreme Court of Pennsylvania, all of his claims have been exhausted because all have been either (1) fairly presented to the Pennsylvania Superior Court and such presentation is sufficient for exhaustion in the courts of Pennsylvania or (2) procedurally defaulted. Having considered all of Blasi's claims pursuant to our authority under 28 U.S.C. § 2254(b)(2), his petition for a writ of habeas corpus will be denied.

We find no substantial showing of the denial of a constitutional right, and therefore decline to issue a certificate of appealability under 28 U.S.C. § 2253(c)(2) and Fed. R. App. P. 22(b). *See generally United States v. Williams*, 158 F.3d 736, 742 and n. 4 (3d Cir. 1998).

An order consistent with this memorandum will issue.

s/ James F. McClure, Jr.
James F. McClure, Jr.
United States District Judge

Appendix B

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

NO. 4:CV-98-1545
(Judge McClure)
(Magistrate Judge Durkin)

JOHN JOSEPH BLASI,

Petitioner

v.

ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA,

Respondent

ORDER

October 2, 2000

For the reasons stated in the accompanying memorandum, IT IS ORDERED THAT:

1. The report and recommendation (record document no. 31) of the magistrate judge is not adopted as the holding of the court, and this order and accompanying memorandum shall constitute the holding of the court.

2. Blasi's objections (record document no. 38) are sustained to the extent that the report and recommendation

are inconsistent with this order and accompanying memorandum, and are otherwise overruled.

3. Blasi's amended petition (record document no. 14) for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is denied.

4. The court declines to issue a certificate of appealability pursuant to 28 U.S.C. § 2253(c)(2); Fed. R. App. P. 22(b).

5. The clerk is directed to close the file.

s/ James F. McClure, Jr.
James F. McClure, Jr.
United States District Judge

APPENDIX C — ORDER OF THE PENNSYLVANIA SUPREME COURT DATED MAY 9, 2000

COURT RULES

SUPREME COURT OF PENNSYLVANIA

IN RE: EXHAUSTION OF STATE REMEDIES IN CRIMINAL AND POST-CONVICTION RELIEF CASES

Dated May 9, 2000

No. 218 Judicial Administration Docket No. 1

ORDER

PER CURIAM:

AND NOW, this 9th day of May, 2000, we hereby recognize that the Superior Court of Pennsylvania reviews criminal as well as civil appeals. Further, review of a final order of the Superior Court is not a matter of right, but of sound judicial discretion, and an appeal to this Court will only be allowed when there are special and important reasons therefor. Pa.R.A.P. 1114. Further, we hereby recognize that criminal and post-conviction relief litigants have petitioned and do routinely petition this Court for allowance of appeal upon the Superior Court's denial of relief in order to exhaust all available state remedies for purposes of federal habeas corpus relief.

Appendix C

In recognition of the above, we hereby declare that in all appeals from criminal convictions or post-conviction relief matters, a litigant shall not be required to petition for rehearing or allowance of appeal following an adverse decision by the Superior Court in order to be deemed to have exhausted all available state remedies respecting a claim of error. When a claim has been presented to the Superior Court, or to the Supreme Court of Pennsylvania, and relief has been denied in a final order, the litigant shall be deemed to have exhausted all available state remedies for purposes of federal habeas corpus relief.

This Order shall be effective immediately.

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT REQUESTING CERTIFICATE OF APPEALABILITY DATED FEBRUARY 13, 2000

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. *00-3527*

JOHN JOSEPH BLASI

v.

ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA

(M.D. Pa. Civ. No. 98-cv-01545)

Present: SLOVITER, BARRY and AMBRO, *CIRCUIT JUDGES*

Submitted is Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1) in the above-captioned case.

Respectfully,

Clerk

Appendix D

ORDER

The request for a certificate of appealability is granted. The parties shall brief the following issues: (1) whether trial counsel was ineffective for failing to preserve the victim's testimony at the preliminary hearing; (2) whether trial counsel was ineffective for failing to object to the testimony of Joanne Kester Blasi on the ground of prosecutorial misconduct in presenting false testimony; (3) whether claim #2 was fairly presented to on direct appeal; (4) whether the Pennsylvania Supreme Court's order of May 9, 2000 permits this court to deem claim 2 exhausted even though it was not presented in the petitioner's allocatur petition on direct appeal. The Attorney General of the Commonwealth of Pennsylvania is invited to file an amicus brief.

By the Court,

s/ illegible
Circuit Judge

Dated: February 13, 2000

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING DATED NOVEMBER 7, 2001

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

00-3527

JOHN JOSEPH BLASI,

Appellant,

v.

ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA

SUR PETITION FOR REHEARING

Present: BECKER, *Chief Judge*, SLOVITER, MANSMANN, SCIRICA, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, and FUENTES, *Circuit Judges*

The petition for rehearing filed by appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

Appendix E

By the Court,

s/ illegible
Circuit Judge

Dated: NOV 7, 2001

ch/cc: DIS
RAG
WPO